Petition

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81-260

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

EXXON CORPORATION,
Petitioner,

v.

GEORGE BUSBEE, ARTHUR K. BOLTON and GEORGIA ASSOCIATION OF PETROLEUM RETAILERS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the standard enunciated by this Court in *A.B. Small Co.* v. *American Sugar Refining Co.* and due process of law permit a civil statute to withstand a vagueness challenge simply because it "*may* be interpreted," as decided by the Court of Appeals below, though the statute is found "obviously somewhat ambiguous" and subject to "entirely different meanings."

2. Whether the standard established by this Court over fifty years ago in *A.B. Small* for review of civil statutes challenged as unconstitutionally vague has been modified *sub silentio* by more recent decisions of the Court.

3. Whether the conflict among the circuits concerning the standard of review applicable to civil statutes challenged as unconstitutionally vague should be resolved.

PARTIES

Exxon Corporation appeared as a plaintiff-appellant before the United States Court of Appeals for the Fifth Circuit.* The Georgia Association of Petroleum Retailers was the sole party appearing as a defendant-appellee before the Fifth Circuit.**

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* The Georgia Oilmen's Association also appeared as a plaintiff-appellant before the Fifth Circuit.

In accordance with Rule 28.1 of the Rules of the Supreme Court, Exxon Corporation lists the following subsidiaries and affiliates whose stock or debt securities are publicly traded in the United States or Canada: Exxon Pipeline Company, Imperial Oil, Limited and Reliance Electric Company.

** The complaint, as filed in the District Court, named George Busbee and Arthur K. Bolton, Governor and Attorney General of the State of Georgia, respectively, as defendants. Pursuant to the District Court's orders of June 21, 1979 and August 3, 1979, Exxon amended its complaint to name the Georgia Association of Petroleum Retailers as a defendant. The District Court's June 21, 1979 order also dismissed Messrs. Busbee and Bolton as defendants. The propriety of that order was not at issue before the Fifth Circuit, and Messrs. Busbee and Bolton were not parties before the appellate court.

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IN THE

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OCTOBER TERM, 1981

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EXXON CORPORATION,

Petitioner,

v.

GEORGE BUSEEE, ARTHUR K. BOLTON and GEORGIA ASSOCIATION OF PETROLEUM RETAILERS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Exxon Corporation ("Exxon") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reproduced in the accompanying Appendix at 1a and reported at 644 F.2d 1030 (5th Cir. 1981). The opinion of the United States District Court for the Northern District of Georgia is reproduced in the accompanying Appendix at 9a and published at 484 F. Supp. 1008 (N.D. Ga. 1979).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit, entered on May 11, 1981 and reproduced in the accompanying Appendix at 35a, affirmed

the judgment of the United States District Court for the Northern District of Georgia. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

Section 1104.1 of the Gasoline Marketing Practices Act of the State of Georgia, Ga. Code § 106-1104.1, provides:

> It shall be an unlawful predatory and unfair business practice for an automotive gasoline distributor who controls product supply, controls the price of the product and has the power to require the purchase of that product by another automotive gasoline distributor or an automotive gasoline dealer doing business in this State to sell said product at prevailing automotive gasoline distributor prices at any time to another automotive gasoline distributor for resale to automotive gasoline dealers with the purpose or intent that said product will be sold at retail by said automotive gasoline distributor and fails to offer its automotive gasoline dealers an opportunity to purchase an equal volume of product upon the same terms and conditions, excepting expenses for advertising, credit cards and other expenses relative to its automotive gasoline dealers, when said automotive gasoline distributor is selling said product at distress prices to other automotive gasoline dealers in the dealer's marketing area.

STATEMENT OF THE CASE

A. The Georgia Gasoline Marketing Practices Act

The Gasoline Marketing Practices Act of the State of Georgia was originally enacted into law on April 13, 1973. The Act was amended on April 11, 1978.[1] As initially enacted and amended, the Act purports to "provide for the regulation of marketing agreements between gasoline distributors and gasoline dealers" and "to define the relationships and responsibilities of the parties to such agreements." (Appendix at 37a.)

The 1978 amendments, insofar as pertinent here, added a new section 1104.1. In what the District Court characterized as "one extraordinarily lengthy sentence," the section provides:

> It shall be an unlawful predatory and unfair business practice for an automotive gasoline distributor who controls product supply, controls the price of the product and has the power to require the purchase of that product by another automotive gasoline distributor or an automotive gasoline dealer doing business in this State to sell said product at prevailing automotive gasoline distributor prices at any time to another automotive gasoline distributor for resale to automotive gasoline dealers with the purpose or intent that said product will be sold at retail by said automotive gasoline distributor and fails to offer its automotive gasoline dealers an opportunity to purchase an equal volume of product upon the same terms and conditions, excepting expenses for advertising, credit cards and other expenses relative to its automotive gasoline dealers, when said automotive gasoline distributor is selling said product at distress prices to other automotive gasoline dealers in the dealer's marketing area.

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[1] The Georgia Gasoline Marketing Practices Act, as amended, is reprinted in the accompanying Appendix at 37a.

Section 1104.1 is incomprehensible. The conduct purportedly proscribed by the section cannot be ascertained. Nowhere in the Act are the terms "distress prices," "controls product supply," "controls the price of that product" or "has the power to require the purchase of that product" defined, although the very applicability of the section is predicated on those terms. Accordingly, the extent to which gasoline distributors are subject to the proscriptions of the section cannot be determined.

While the section apparently applies to two classes of distributors, it is impossible to distinguish one class from the other. Thus, for example, although the section appears to apply only "when said automotive gasoline distributor is selling said product at distress prices to other automotive dealers in the dealer's marketing area," it is impossible to determine whether "said automotive gasoline distributor" refers to the initial distributor which sold gasoline to a second distributor, or to the second distributor which purchased and resold the gasoline.

The pervasive vagueness and numerous ambiguities render section 1104.1 incomprehensible. As a result, those subject to the proscriptions of section 1104.1 are given no notice of what conduct may be deemed violative of the Act.

B. Opinions Below

Each of the lower courts found section 1104.1 to be replete with ambiguities which rendered the statute subject to different and conflicting meanings.[2] These determinations notwithstanding, each of the lower courts held the section not unconstitutionally vague. Each court

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[2] The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1331.

below also expressly refused to determine the meaning of the section.[3]

The District Court stated that the constitutionally based vagueness doctrine has been "carefully limited to discrete areas of the law," with the effect that civil statutes should be viewed with "extreme tolerance" and, though subject to different and conflicting meanings, should be upheld if "capable of comprehension." On this basis, the District Court held section 1104.1 not unconstitutionally vague. It did so despite recognizing that the section "is obviously somewhat ambiguous," contains "admittedly imprecise language," "is surely not a model of clarity" and "is grammatically deficient" in a variety of respects. The District Court further recognized that "the reader has difficulty discerning whether the section proscribes two sets of activities . . . or whether the section imposes a single prohibition" and that "the parties have assumed it to have entirely different meanings." These findings notwithstanding, the District Court upheld the statute on the ground that it is "capable of comprehension" and not "impossible to devine." (Appendix at 16a-24a.)

Agreeing with the District Court that section 1104.1 is "most assuredly *not* a 'model of clarity,'" the Court of Appeals nonetheless upheld the statute, stating that "our only role is to determine whether . . . the statute *may* be interpreted." According to the Court of Appeals, the section is "at least amenable to some sensible construction" and is not, therefore, unconstitutionally vague. (Appendix at 8a; emphasis the court's.)

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[3] The District Court, although acknowledging that "differing views as to [section 1104.1's] basic operation raise vagueness questions that must be resolved," stated that "[w]e have no need, and thus decline, to decide definitively which of the conflicting interpretations is correct." (Appendix at 23a.) Likewise, the Court of Appeals stated that "it is not for us to offer a definitive interpretation of section 1104.1." (Appendix at 8a.)

REASONS FOR GRANTING THE WRIT

I. The Writ Should Be Granted Because The Decision Of The Court Of Appeals Conflicts With The Most Recent Decision Of This Court, Issued Over Fifty Years Ago, Regarding The Standard Of Review Applicable To Civil Statutes Challenged As Unconstitutionally Vague

In *A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233 (1925), this Court held a civil statute unconstitutionally vague because it required "obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all." (267 U.S. at 239.) Since its decision in *A.B. Small* in 1925, the Court has not reviewed the standard applicable to civil statutes challenged as unconstitutionally vague.

The constitutional basis of this Court's holding in *A.B. Small* was that due process requires that persons subject to statutes, whether civil or criminal, be afforded fair notice of the conduct proscribed by those statutes. Thus, the Court explicitly refused to hold the vagueness doctrine inapplicable to civil statutes, stating that "[i]t was not the criminal penalty which was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all." (267 U.S. at 239.)

Since its decision in *A.B. Small*, the Court has reaffirmed the applicability of the vagueness doctrine to civil legislation and, in particular, the precept that a statute, whether civil or criminal, must provide fair and adequate warning of the conduct sought to be proscribed. In *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), for example, the Court recognized that a state's characterization of a statute as civil did not alter the need to provide adequate notice of the proscribed conduct:

> Both liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute. So here this state Act whether labeled "penal" or not must meet the challenge that it is unconstitutionally vague. (382 U.S. at 402.)

The Court has emphasized that "[v]ague laws in *any* area suffer a constitutional infirmity," *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966) (emphasis supplied), and that "criminal or civil defendants [must] be given fair notice that they have engaged in illegal activity." *Chiarella v. United States*, 445 U.S. 222, 235 n.20 (1980) (citation omitted). Although reaffirming the applicability of the vagueness doctrine to civil legislation, the Court, since *A.B. Small*, has not reviewed the standard to be applied when such legislation is challenged as unconstitutionally vague.[4]

Consideration of this issue is particularly compelling in light of decisions of this Court which have cast doubt upon the continued applicability of the *A.B. Small* standard. In *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), for example, the Court held unconstitutionally vague a state statute that permitted a jury to impose prosecution costs on an acquitted defendant and provided for his commitment to jail in default of payment. In a de-

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[4] The Court has stated repeatedly that a statute imposing criminal sanctions will be voided if it is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . ." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). *Accord, United States v. Harriss*, 347 U.S. 612, 617 (1954). The Court has also stated that statutes affecting First Amendment rights require a "greater degree of specificity." *Smith v. Goguen*, 415 U.S. 566, 573 (1974). *Accord, Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976).

parture from the standard articulated in *A.B. Small*, the Court stated that, "whether labeled 'penal' or not," "a law fails to meet the requirements of the Due Process Clause if . . . it leaves the public uncertain as to the conduct it prohibits. . . ." (382 U.S. at 402.) The need to clarify the standard applicable to civil legislation challenged as unconstitutionally vague provides a further basis for granting the writ in this case.

Moreover, the decision of the Court of Appeals in this case stands in irreconcilable conflict with the holding and rationale of this Court in *A.B. Small*. In holding that any statute which "*may* be interpreted" will withstand a vagueness challenge, the Court of Appeals below has sanctioned a standard never recognized by this or any other court, and under which even the most vague and indefinite statutes would withstand constitutional scrutiny. Any statute "*may* be interpreted." Thus, the court below has upheld a statute and articulated a standard which, contrary to this Court's holding in *A.B. Small*, "exact[s] obedience to a rule or standard . . . so vague and indefinite as really to be no rule or standard at all." (267 U.S. at 239.) The decision below also conflicts with the rationale of the vagueness doctrine in that it upholds a statute which fails to afford affected parties with notice of the conduct purportedly proscribed.

Because the decision below conflicts with the holding and rationale of this Court's decision in *A.B. Small*, and because of the need to clarify the standard of review applicable to civil statutes challenged as unconstitutionally vague, the writ should be granted.

II. The Writ Should Be Granted To Resolve The Conflict Among The Circuits Regarding The Standard Of Review Applicable To Civil Statutes Challenged As Unconstitutionally Vague

Since this Court's decision in *A.B. Small* over fifty years ago, there has emerged among the circuits a wide divergence regarding the standard of review applicable to civil statutes challenged as unconstitutionally vague. The compelling need to resolve this conflict provides an additional basis for granting the writ in this case.

Despite this Court's holding in *A.B. Small*, many lower courts addressing the issue have not treated *A.B. Small* as the only formulation of the appropriate standard of review.[5] For example, in *Horn v. Burns & Roe*, 536 F.2d 251, 254 (8th Cir. 1976), the Court of Appeals for the Eighth Circuit applied a standard far broader than that enunciated by this Court in *A.B. Small*:

> The Supreme Court has recognized that a non-criminal statute is unconstitutionally vague under the due process clause of the Fifth or Fourteenth Amendments when its language does not convey sufficiently definite warning as to the proscribed conduct when measured by common understanding or practice.
>
> • • • •
>
> A finding of vagueness will thus result where "the exaction of obedience to a rule or standard . . . was so vague and indefinite as really to be no rule or standard at all" . . . *or* where the statute is written in such terms that "men of common intelligence must necessarily guess at its meaning and differ as to its application. . . ." (Emphasis supplied; citations omitted.)

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[5] These courts have viewed *A. B. Small* as having been modified *sub silentio* by subsequent decisions of the Court involving statutes imposing criminal sanctions or infringing First Amendment rights.

The Eighth Circuit recently reaffirmed the applicability of this standard to civil statutes, stating that "[t]he simple question is whether the challenged words 'are such that the ordinary person exercising common sense can sufficiently understand and fulfill' the prescriptions of the statute." *Jump v. Goldenhersh*, 619 F.2d 11, 15 (8th Cir. 1980) (citation omitted).[6]

The Court of Appeals for the Tenth Circuit held a similar standard applicable to civil legislation challenged as unconstitutionally vague. In *Brennan v. Occupational Safety & Health Review Commission*, 505 F.2d 869, 872 (10th Cir. 1974), the court stated that an administrative regulation "promulgated pursuant to remedial civil legislation" and "not concerned with the definition of a crime or with an inhibition on the exercise of First Amendment rights" is unconstitutional if it "is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Thus, to withstand a vagueness challenge in the Tenth Circuit, a civil statute must " 'delineate its reach in words of common understanding.' " (505 F.2d at 872; citation omitted.)

The Ninth Circuit has emphatically rejected the standard adopted by the Fifth Circuit below, stating that "[s]tatutes prescribing penalties, civil or criminal, must be drafted without ambiguity." *PACCAR, Inc. v. National Highway Traffic Safety Administration*, 573 F.2d 632, 645 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978).

The standard applied by the Fifth Circuit in this case conflicts with the standards applied by the Eighth, Ninth

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[6] District Courts in the Eighth Circuit have applied a similar standard in reviewing civil statutes challenged as unconstitutionally vague. *See Stamus v. Learhardt*, 414 F. Supp. 439 (S.D. Iowa 1976); *Alsager v. District Court*, 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd*, 545 F.2d 1137 (8th Cir. 1976).

and Tenth Circuits. In upholding civil statutes which, however vague and ambiguous, "*may* be interpreted," the Fifth Circuit has adopted a standard which would permit to stand even the most vague and indefinite statutes and which, in fact, is no standard at all. *See A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. at 239.[7] Moreover, the findings of the courts below that section 1104.1 is "obviously somewhat ambiguous" and subject to "entirely different meanings," leave no doubt but that section 1104.1 would not withstand vagueness scrutiny under standards applied by other circuits.

The need to resolve this conflict among the circuits mandates issuance of the writ in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 10, 1981

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[7] *See also Federal Election Commission v. Lance*, 635 F.2d 1132, 1142 (5th Cir. 1981), wherein the Fifth Circuit stated that "[w]hen a statute imposing civil penalties is claimed to be vague, . . . a court's proper role is to construe the statute's language, if possible, and then apply the statute as construed."

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
UNIT B

No. 80-7153

EXXON CORPORATION,
Plaintiff-Appellant,

v.

GEORGE D. BUSBEE, ETC. *et al.*,
Defendants,

GEORGIA ASSOCIATION OF PETROLEUM RETAILERS,
Defendant-Appellee.

GEORGIA OILMEN'S ASSOCIATION, INC.,
Plaintiff-Appellant,

v.

GEORGE D. BUSBEE, ETC. *et al.*,
Defendants,

GEORGIA ASSOCIATION OF PETROLEUM RETAILERS,
Defendant-Appellee.

May 11, 1981

Before TJOFLAT, FRANK M. JOHNSON, Jr., Circuit Judges and SCOTT*, District Judge.

TJOFLAT, Circuit Judge:

Exxon Corporation and the Georgia Oilmen's Association have appealed from part of the district court's resolution of their consolidated declaratory judgment actions.

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* District Judge of the Middle District of Florida, sitting by designation.

See 28 U.S.C. §§ 2201 & 2202 (1976). We affirm the decision of the district court, 484 F.Supp. 1008.

I

Georgia originally enacted its Gasoline Marketing Practices Act, Ga.Code § 106-1101 *et seq.*, in 1973. Its avowed purpose was to regulate marketing agreements between gasoline distributors and gasoline dealers. Record, vol. 1 at 27. In furtherance of this purpose, Georgia amended the Act in 1978 to include new section 1104.1. That provision reads:

> It shall be an unlawful predatory and unfair business practice for an automotive gasoline distributor who controls product supply, controls the price of the product and has the power to require the purchase of that product by another automotive gasoline distributor or an automotive dealer doing business in this State to sell said product at prevailing automotive gasoline distributor prices at any time to another automotive gasoline distributor for resale to automotive gasoline dealers with the purpose or intent that said product will be sold at retail by said automotive gasoline distributor and fails to offer its automotive gasoline dealers an opportunity to purchase an equal volume of product upon the same terms and conditions, excepting expenses for advertising, credit cards and other expenses relative to its automotive gasoline dealers, when said automotive gasoline distributor is selling said product at distress prices to other automotive gasoline dealers in the dealer's marketing area.

Ga. Code § 106-1104.1

Soon after the legislature passed this amendment, Exxon Corporation and the Georgia Oilmen's Association filed separate declaratory judgment actions challenging section 1104.1 as unconstitutionally vague and unenforce-

able.[1] These actions were subsequently consolidated. Record, vol. 1 at 113.[2]

After each party moved for summary judgment, the district court entered an order holding section 1104.1 constitutional. Although the court found the statute to be "ambiguous," "imprecise," and "grammatically deficient," record, vol. 2 at 350, it upheld the statute because it was not "impossible to divine," *id.* at 352, and thus not so completely indefinite as to deny appellants due process. *Id.* at 350, quoting *A. B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 239, 45 S.Ct. 295, 297, 69 L.Ed. 597 (1925).

II

We feel constrained by considerations of comity and ripeness to examine the propriety of reaching the merits of this dispute. Our first concern is for the prerequisite of a ripe controversy. *See Federal Election Commission v. Lance*, 635 F.2d 1132, 1138 (5th Cir. 1981).

On rebriefing ordered by the court, appellants assert that because they presently are obligated to conform their conduct to section 1104.1, and because there is an imminent threat of litigation potentially resulting in liability, the controversy before the court is ripe for decision. These assertions, standing alone, are not enough to jus-

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[1] These actions sought judicial declarations concerning numerous provisions of the Gasoline Marketing Practices Act. *See* record, vol. 1 at 4; *id.*, vol. 1 N-61 at 4. This appeal, however, is concerned solely with the district court's ruling on the validity of section 1104.1.

[2] Both Exxon and the Oilmen's Association originally named Georgia Governor Busbee and State Attorney General Bolton as parties-defendant; the Oilmen's complaint also named the Georgia Association of Petroleum Retailers. Thereafter, the Governor and Attorney General were dismissed as parties, and Exxon amended its complaint to name the Georgia Association of Petroleum Retailers as defendant.

tify opining on the question before us. The contingency of future litigation may not be offered successfully as the basis for present judicial action. *Id.*, quoting 13 *Wright, Miller & Cooper, Federal Practice and Procedure* § 3532 (1975). The district court found, however, that "civil actions authorized by the [Gasoline Marketing Practices] Act are imminent" and therefore that the controversy concerning the enforceability of section 1104.1 was a live, ripe one. Record, vol. 2 N-61 at 336, *citing Blanchette v. Connecticut General Insurance Corps*, 419 U.S. 102, 138-142, 95 S.Ct. 335, 356-358, 42 L.Ed.2d 320 (1974).

We cannot say that the district court was clearly erroneous in finding it certain that litigation under the Act would immediately arise among these parties. Given that finding, and the immediate applicability to appellants of section 1104.1, *see Lake Carriers' Association v. MacMullan*, 406 U.S. 498, 507, 92 S.Ct. 1749, 1755, 32 L.Ed. 2d 257 (1972), we believe the parties have presented us with a ripe, justiciable controversy concerning the enforceability of section 1104.1. *See id.* at 506, 92 S.Ct. at 1755.

Next, because section 1104.1 has yet to be interpreted by the Georgia courts, and because commercial regulation is a matter of legitimate interest to the state, we must examine whether *Railroad Commission of Texas v. Pullman*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), mandates staying our hand in this dispute. On reflection, it appears that *Pullman* does not so mandate.

As we clarified in *Palmer v. Jackson*, 617 F.2d 424, 428 (5th Cir. 1980), two conditions must exist before *Pullman* abstention is necessary: "an unsettled issue of state law; and . . . a possibility that the state law determination will moot or present in a different posture the federal constitutional question raised." In this case, the second condition is absent. Section 1104.1 has been attacked

as unconstitutionally vague. Because section 1104.1 is a non-penal, commercial regulatory statute, the standard for evaluating its constitutionality is whether the statute is so indefinite as to amount to "no rule or standard at all." *A. B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 239, 45 S.Ct. 295, 297 (1925). *See also infra* at p. 5. Yet in the context of this case, in order to find *Pullman* abstention necessary, we would have to find that a state court *could* possibly decide that section 1104.1 was comprehensible, and thus enforceable; only if the state court finds it comprehensible can it then moot the constitutional challenge or present it in a different posture. Acknowledging the bare possibility that the state court could find the statute comprehensible, however, would in itself be a *sub silentio* determination of the federal constitutional question for decision—whether section 1104.1 is indeed capable of interpretation. Thus, a decision to abstain here would be tantamount to a decision, albeit nonbinding, on the constitutional adequacy of the statute. *See Baggett v. Bullitt*, 377 U.S. 360, 376-77 n. 13, 84 S.Ct. 1316, 1325-26 n. 13, 12 L.Ed.2d 377 (1964). Abstention, therefore, would defeat the purpose behind *Pullman*, while engendering needless delay, expense, and duplication of judicial activity. *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 418, 84 S.Ct. 461, 466, 11 L.Ed.2d 440 (1964). Under these circumstances, we decline to stay our hand, and will proceed to the merits.

On appeal, Exxon and the Oilmen's Association assert that section 1104.1 is completely incomprehensible; they argue that even under the lenient standard of review employed when a state civil statute is subjected to a vagueness attack in federal court, section 1104.1 must fall because it "is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Brief of Exxon Corporation* at 11, quoting

Brennan v. Occupational Safety and Health Review Commission, 505 F.2d 869, 872 (10th Cir. 1974). Indeed, appellants state that despite a painstaking analysis of the statute, it is "*impossible* to determine either the nature of the proscribed conduct or the persons to which the proscriptions were intended to apply." *Brief of Exxon Corporation* at 14 (emphasis added).[3]

To further the health and well-being of our adversarial system of justice, appellee, the Georgia Association of Petroleum Retailers, has provided the court with a "simple analysis" of section 1104.1 in order to illustrate its intelligibility. The cumulation of that analysis is a conclusory declaration that "[t]he nature and scope of the proscribed activity *could hardly be made clearer*." *Brief of Georgia Association of Petroleum Retailers* at 16-17 (emphasis added).

While it is true that the void-for-vagueness doctrine is most rigorously applied in the context of penal statutes, *Federal Election Commission v. Lance*, 635 F.2d at 1142, and in the area of first amendment rights, *Ryder Truck Lines, Inc. v. Brennan*, 497 F.2d 230, 233 (5th Cir. 1974), the Supreme Court has recognized that "[v]ague laws in *any* area suffer a constitutional infirmity." *Ashton v. Kentucky*, 384 U.S. 195, 200, 86 S.Ct. 1407, 1410, 16 L.Ed.2d 469 (1966) (emphasis added). *See also Reeves v. McConn*, 631 F.2d 377, 383 (5th Cir. 1980).

Because it has become too easy for all concerned to discuss the void-for-vagueness doctrine without articulating either its constitutional foundation or its implication for

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[3] Appellants complain both of the overall unintelligibility of § 1104.1 and of the added indefiniteness allegedly caused by the inclusion of the undefined, yet apparently controlling phrases, "distress prices," "controls product supply," "controls the price of the product," and "has the power to require the purchase of that product." *See Brief of Exxon Corporation* at 14.

different types of statutes, we will quote at length from a Supreme Court discussion that clarifies the theory behind the rule. In *A. B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 45 S.Ct. 295, 69 L.Ed. 597 (1925), the Court faced a contract dispute in which one of the parties argued that a statutory defense offered by its adversary was negated by the undue vagueness of the statute it was based on. The adversary responded that what we now refer to as the void-for-vagueness doctrine did not apply outside the criminal arena. The Court rejected this distinction:

> In a series of cases . . . this court held [the relevant] provision invalid as contravening the due process of law clause of the Fifth Amendment, among others, because it required that the transactions named should conform to a rule or standard which was so vague and indefinite that no one could know what it was . . . .
>
> The defendant attempts to distinguish those cases because they were criminal prosecutions. But that is not an adequate distinction. The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, *but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all.* Any other means of exaction, such as declaring the transaction unlawful or stripping a participant of his rights under it, was equally within the principle of those cases.

Id. at 238-239, 45 S.Ct. at 297.

Thus, section 1104.1 may not escape scrutiny simply because it is a commercial regulatory statute. *See Brennan v. Occupational Safety and Health Review Commission*, 505 F.2d 869 (10th Cir. 1974). Because the statute

is not concerned with either the first amendment or the definition of criminal conduct, however, we must be lenient in evaluating its constitutionality. For section 1104.1 to constitute a deprivation of due process, it must be "so vague and indefinite as really to be no rule or standard at all." *A. B. Small Co.*, 267 U.S. at 239, 45 S.Ct. at 297 (1925). To paraphrase, uncertainty in this statute is not enough for it to be unconstitutionally vague; rather, it must be substantially incomprehensible.

Having applied this test to the statute before us, we find that the district court did not err in ruling it definite enough. Surely, as is tacitly admitted by the parties before us, it can be ascertained that the statute applies to gasoline distributors such as Exxon. Moreover, while their constructions differ, the parties themselves have offered possible interpretations of section 1104.1. *See* Record, vol. 2 at 351-352. These attempts at statutory construction illustrate that section 1104.1 is, while most assuredly *not* a "model of clarity," *id.* at 350, at least amenable to some sensible construction. Thus, it does alert the parties to the character of the proscribed conduct, *Ryder Truck Lines*, 497 F.2d at 233, and does amount to something more than "no rule . . . at all." *A. B. Small Co.*, 267 U.S. at 239, 45 S.Ct. 297.

In the context of this declaratory judgment action, it is not for us to offer a definitive interpretation of section 1104.1. Rather, our only role is to determine whether, indeed, the statute *may* be interpreted. Since it may, the decision of the district court must be AFFIRMED.

UNITED STATES DISTRICT COURT
N. D. GEORGIA
ATLANTA DIVISION

Civ. A. Nos. 78-982 A, 78-1077 A

EXXON CORPORATION,

v.

GEORGIA ASSOCIATION OF PETROLEUM RETAILERS.

GEORGIA OILMEN'S ASSOCIATION, INC.

v.

GEORGE D. BUSBEE *et al.*

Dec. 28, 1979

ORDER

RICHARD C. FREEMAN, District Judge.

With the passage of the Gasoline Marketing Practices Act of 1973, Ga. Code §§ 106-1101 et seq., the state of Georgia undertook to regulate relations among actors at all levels of the statewide gasoline distribution network. Intended to protect retailers from what the legislature perceived to be unfair marketing practices by large gasoline companies and gasoline jobbers,[1] the Act governs terms and conditions of franchise agreements and limits

[1] The Act, by definition, classifies all persons who sell or consign gasoline to dealers as "distributors." Ga. Code § 106-1103(a). Amicus Curiae Gulf Oil Corporation proposes that proper analysis of the gasoline marketing industry requires a tri-partite classification in which distributors are further defined as either suppliers (major oil refiners or suppliers) or jobbers (middlemen who buy from suppliers and sell to retailers). Most of the parties have employed this nomenclature and we adopt it in portions of this order. Of course, all gasoline marketed in Georgia does not necessarily pass through a three-step distribution process.

certain sales of wholesale and distress gasoline. In this action, one major gasoline supplier—Exxon Corporation—and an organization representing distributors operating in the state—Georgia Oilmen's Association, Inc. [hereinafter GOA]—have sued for a judicial declaration that various portions of the Gasoline Marketing Practices Act are void under the United States Constitution. *See* 28 U.S.C. §§ 1331, 2201, and 2202. Originally named as defendants were the Governor and Attorney General of Georgia, and the Georgia Association of Petroleum Retailers [hereinafter GAPR], although only GAPR is presently a party. The action now stands before the court on cross-motions for summary judgment, Rule 56, Fed.R. Civ.P.

I. *THE HISTORY OF THE CASE*

Plaintiff Exxon filed Civil Action No. 78-982 on June 2, 1978, naming as defendants Georgia Governor Busbee and Georgia Attorney General Arthur K. Bolton. GOA filed Civil Action No. 78-1077A on June 26, 1978. GOA named not only defendants Busbee and Bolton, but also GAPR. GAPR sought summary judgment almost immediately, on August 11, 1978. In late September 1978, the plaintiffs moved to consolidate the two actions and filed their own summary judgment motions. Gulf Oil Corporation submitted an amicus curiae brief, in support of plaintiffs' position, on November 27, 1978. By the end of 1978, the substantive issues in the action had been fully briefed by all sides.

Despite the parties' eagerness to obtain speedy adjudication of the dispute, an additional consideration, first raised by the court, necessitated a delay of several months. In an order entered March 6, 1979, we expressed doubt as to the existence of a genuine "case or controversy" between the parties, within the contemplation of Article III of the United States Constitution. We noted

that the Act, on its face, conferred no enforcement responsibility on defendants Busbee and Bolton; we expressed concern that the private defendants were merely attempting to continue a legislative battle (which they had fought in representative capacities) in the judicial forum. Fearful that "the plaintiffs may have brought a lawsuit in search of a defendant," March 6, 1979 order at 2, we requested that the parties submit briefs directed to the existence of a case or controversy and the propriety of allowing each of the parties to participate in the action.

Exxon, GOA, and GAPR all agreed that the case could be heard and urged that all parties named in the action were properly included. In an order dated June 21, 1979, we concluded that the action could continue, but only as between the private litigants. The members of GAPR and GOA were potential plaintiffs and defendants in a civil suit for damages authorized under the Act and would have had a "sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Sierra Club v. Morton*, 405 U.S. 727, 731, 92 S.Ct. 1361, 1364, 31 L.Ed.2d 636 (1972). As organizations composed of such potential litigants, GOA and GAPR might sue and be sued, consistent with Article III, under the controlling Supreme Court cases. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 39-40, 96 S.Ct. 1917, 1924-1925, 48 L.Ed.2d 450 (1976); *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

At the same time, we determined that the complete absence of any actual enforcement power—criminal, civil, or administrative—in the hands of the state defendants precluded any possible "case or controversy" between them and the plaintiffs. We allowed Exxon, which had only named Busbee and Bolton as defendants, leave to amend its complaint to add defendant GAPR and dismissed the claims of all plaintiffs against the state defendants.

II. *THE CONTENTIONS OF THE PARTIES*

Purged of its Article III impurities, the action may proceed upon an evaluation of the pending summary judgment motions. Exxon's challenges to the Act are

> *First*, Sections [1104.1],[2] 1104(h) and 1104(i) of the Georgia Act provides neither ascertainable standards of guilt nor adequate notice of proscribed conduct, thereby denying Exxon due process of law in violation of the Constitutions of the United States and the State of Georgia.[3]
>
> *Second*, Sections [1104.1], 1104(h), and 1104(i), 1104(j), 1104(k) and 1107 of the Georgia Act are expressly preempted by and in conflict with the purposes and objectives underlying the federal Petroleum Marketing Practices Act [15 U.S.C. § 2801 *et seq.* (PMPA)] and are, therefore, invalid under the Supremacy Clause, Article VI, Clause 2, of the United States Constitution.
>
> *Third*, in encouraging or requiring automotive gasoline distributors to engage in conduct proscribed by the federal Sherman Act [15 U.S.C. § 1 *et seq.*] and in frustrating the pro-competitive purposes underlying the Act, Section [1104.1] of the Georgia Act conflicts with superior federal law and is invalid under the Supremacy Clause.

Exxon reply memorandum, filed December 12, 1978, at 2. GOA raises these same contentions and also alleges (1)

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[2] Section 4A of the Act, cited in Exxon's brief, has been codified as Ga. Code § 106-1104.1. In this order we will cite to the codified form of the statute.

[3] Exxon has not invoked the court's diversity or pendant jurisdiction, and has not separately discussed the applicability of the Georgia constitution. We thus consider that the case presents only federal constitutional issues.

that section 106-1104.1 conflicts with section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), and (2) that section 106-1104.1 is preempted by the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 751 *et seq.* [hereinafter EPAA]. Before proceeding to an evaluation of the plaintiffs' claims, we will briefly review the challenged portions of the Georgia Act.

III. *THE GEORGIA ACT*

The Georgia Marketing Practices Act contains two sets of conduct-governing provisions. After several introductory provisions and a definitional section, Ga. Code § 106-1103, section 106-1104 sets forth an extensive series of rules regulating gasoline marketing agreements, or franchises, between a supplier and a retailer.[4] These provi-

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[4] Section 106-1104 provides:

> It shall be a violation of this Chapter for any gasoline distributor who has a marketing agreement with a gasoline dealer, directly or indirectly, through any officer, agent or employee, to commit any of the following acts:
>
> (a) to terminate or cancel such marketing agreement without good cause prior to the expiration date;
>
> (b) to terminate or cancel an existing marketing agreement prior to expiration date or to not enter subsequent agreements without having first given written notice setting forth all the reasons for such action to the gasoline dealer at least 60 days in advance of such termination, cancellation or expiration of the existing agreement; provided, however, that such notice shall not be required of a gasoline distributor acting with reasonable cause to believe said dealer is maliciously and willfully damaging the property rights of said gasoline distributor, who has voluntarily abandoned the marketing relationship, or who after five days notice has failed to pay his just debts when due to said distributor;
>
> (c) by the use of coercion, intimidation or threats, to force or induce such gasoline dealer to deal exclusively in products manufactured, distributed or sponsored by such gasoline distributor or to participate in promotions. Hours of

sions affect the contents of any franchise agreement and the allowable grounds upon which a supplier may terminate an agreement.

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operation, which are set in any written agreement, in effect prior to July 1, 1978, can only be changed by mutual consent. It shall also be the duty of the distributor to advise the dealer in writing prior to execution of the agreement the projected potential gallonage and the dealer shall acknowledge same in writing prior to execution of the marketing agreement that he is willing to accept same;

(d) to engage in any acts which have the purpose, intent or effect of fixing or maintaining prices, or of forcing or inducing adherence to prices at which such gasoline distributor's products are to be resold by such gasoline dealers: Provided, that nothing herein shall be deemed to prohibit recommendation, suggestion, urging or discussion;

(e) to require a gasoline dealer, at the time of entering into a marketing agreement, to assent to a release, assignment, novation, waiver or estoppel which would relieve any person from liability imposed by this Chapter;

(f) to require or prohibit any change in management of any gasoline dealer unless such requirement or prohibition of change shall be for good cause, which cause shall be stated in writing by the gasoline distributor;

(g) to impose standards of performance upon the gasoline dealer other than those in the marketing agreement;

(h) to provide any term or condition in any marketing agreement, or other agreement, ancillary or collateral thereto, which term or condition directly or indirectly violates this Chapter;

(i) after July 1, 1978, to require operation in excess of a six-day week and/or in excess of a 12-hour day if the dealer can prove it results in substantially lessening the profits earned in his entire operation to the extent that it is not economically feasible to continue said operation: Provided, however, that the provisions of this subsection shall in no way impair the obligation of contracts made prior to July 1, 1978: and Provided, further, that the provisions of this subsection shall not impair the writing of a contract for hours in excess of the hours expressed herein or to impair the right to enforce

Ga. Code § 106-1104.1 imposes restrictions on sales by suppliers and jobbers. It reads:

> It shall be an unlawful predatory and unfair business practice for an automotive gasoline distributor who controls a product supply, controls the price of that product and has the power to require the purchase of that product by another automotive gasoline distributor or an automotive gasoline dealer doing business in this State to sell said product at prevailing automotive gasoline distributor prices at any time to another automotive gasoline distributor for resale to automotive gasoline dealers with the pur-

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the hours contained in any contract until sufficient evidence is available to a dealer to exercise the rights hereinbefore provided: and Provided, further, that the provisions of this subsection shall not be applicable to dealers or distributors who operate a food or convenience store in conjunction with the retail sale of automotive gasoline and related products;

(j) after July 1, 1978, to refuse to continue to deal with an automotive gasoline dealer with whom it has had a marketing agreement for three years unless:

(1) the dealer fails to comply with conditions of such agreement or fails to act in good faith in carrying out the terms of such agreement, or

(2) such automotive gasoline distributor's principal stockholder or principal operator dies during the term of any marketing agreement, in which case such agreement may be refused renewal by the heirs giving notice as provided for in this Chapter, or

(3) the dealer has violated the laws of this State relative to the ownership or operation of retail businesses;

(k) after July 1, 1978, to refuse to continue to deal with an automotive gasoline dealer with whom it has had a marketing agreement for three years if such automotive gasoline dealer satisfies the court in an action brought by the automotive gasoline dealer under this Section that such refusal to deal is not the product of the good faith business judgment of the automotive gasoline distributor.

> pose or intent that said product will be sold at retail by said automotive gasoline distributor and fails to offer its automotive gasoline dealers an opportunity to purchase an equal volume of product upon the same terms and conditions, excepting expenses for advertising, credit cards and other expenses relative to its automotive gasoline dealers, when said automotive gasoline distributor is selling said product at distress prices to other automotive dealers in the dealer's marketing area.

The section is obviously somewhat ambiguous, and is consequently the target of a vigorous "void for vagueness" challenge by the plaintiffs.

Section 106-1105 gives practical effect to the standards mandated in the previous provisions by creating a cause of action for money damages by a gasoline dealer believing he has been injured in violation of the Act. The dealer may also seek declaratory or injunctive relief. Section 106-1106 states that the Act shall be applied prospectively, and section 106-1107 sets out defenses available to a distributor.

Section 106-1108 imposes certain procedural obligations upon a dealer whose franchise has been terminated but who claims a right to continue doing business under the Act. Sections 106-1109 and 106-1110 govern the applicability of the Act to franchise agreements and real property rights, respectively. Section 106-1111 allows a franchisor to sue for breach of a franchise or rental agreement. Finally, section 106-1112 imposes a two-year statute of limitations upon actions brought under sections 106-1105 and 106-1111.

IV. VAGUENESS

Plaintiffs' void-for-vagueness challenge contains two related arguments. First, they argue that words of the Georgia law are undefined, unfamiliar, or otherwise so

vague that the Act "not only fails to provide adequate notice of the meaning and scope of proscribed conduct, but . . . also fails to set forth an ascertainable standard of guilt." Plaintiffs continue, "This fatal indefiniteness violates the due process principle of fundamental fairness." Memorandum in support of Exxon's motion for summary judgment, filed September 22, 1978, at 6.[5] Plaintiffs attack the terms "distress prices," "controls product supply," "controls the price of that product," and "has the power to require the purchase of that product" in section 106-1104.1; "indirectly violates" in section 106-1104(h); and "economically feasible" and "food or convenience store" in section 106-1104(i).

In addition, the plaintiffs claim that section 1104.1 is incomprehensible. Apart from its many undefined and ambiguous terms, they argue, the provision is grammatically—and therefore logically—deficient, so that it is impossible to discern even the barest outlines of the conduct the legislature intended to proscribe.

Void for vagueness analysis begins with recognition that the doctrine has been carefully limited to discrete areas of the law. Statutes affecting first amendment free speech rights and statutes proscribing criminal penalties have consistently faced a considerably higher level of scrutiny than ordinary civil laws. *See Hynes v. Mayor and Council of Borough of Oradell*, 425 U.S. 610, 96 S.Ct. 1755, 48 L.Ed.2d 243 (1976); *Ashton v. Kentucky*, 384 U.S. 195, 86 S.Ct. 1407, 16 L.Ed.2d 469 (1966); *Buckley v. Valeo*, 171 U.S.App.D.C. 172, 225-226, 519

[5] As we will explain, proper analysis of a void for vagueness attack requires an early inquiry into whether the proscriptions of the challenged statute are civil or criminal. Although Exxon fails to discuss explicitly this fundamental distinction, the fact that its description is couched in criminal terms betrays an awareness that the criminal statute is more easily susceptible to a void for vagueness challenge. The Georgia Act, of course, carries no criminal penalties.

F.2d 821, 874-75 (D.C.Cir.1975), *aff'd in part* and *rev'd in part*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976); *Hunter v. Allen*, 422 F.2d 1158 (5th Cir. 1970), *rev'd*, 401 U.S. 989, 91 S.Ct. 1237, 28 L.Ed.2d 528 (1971); *Massachusetts Welfare Rights Organization v. Ott*, 421 F.2d 525 (1st Cir. 1969). The reasons behind this discrepancy are apparent. Courts are naturally fearful that an overly conservative citizen seeking to comply with an uncertain law will forego exercise of free speech rights. And the cases identify loss of liberty as a particularly severe penalty to one who is unsure how to pattern his conduct.[6]

Outside of the first amendment and criminal spheres, the void for vagueness doctrine has had little application. To be sure, there have been cases which, in dictum, have suggested its continued "relevance" to all civil statutes. *Boutilier v. Immigration and Naturalization Service*, 363 F.2d 488, 495 (2d Cir. 1966), *aff'd*, 387 U.S. 118, 87 S.Ct. 1563, 18 L.Ed.2d 661 (1967). *See Zwickler v. Koota*, 389 U.S. 241, 249, 88 S.Ct. 391, 396, 19 L.Ed.2d 444 (1967); *Ashton v. Kentucky*, 384 U.S. 195, 200, 86 S.Ct. 1407, 1410, 16 L.Ed.2d 469 (1966). But the cases routinely approve the challenged statutes, and the Fifth Circuit has recently hinted that the void for vagueness doctrine may have little or no application outside of the first amendment or criminal contexts.

> As thus construed, we conclude that the reporting requirements do not infringe on any of Appellees' constitutional rights. Their free-speech, first amend-

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[6] Courts have also scrutinized with extreme caution laws involving sanctions deemed as serious as criminal penalties. *See, e. g., Alsager v. District Court of Polk County, Iowa (Juvenile Division)*, 406 F.Supp. 10 (D. Iowa 1975), *adopted* 545 F.2d 1137 (8th Cir. 1976) (termination of parental rights). *See also Pacear v. National Highway Traffic Safety Administration*, 573 F.2d 632 (9th Cir. 1978) (dictum) (statutes "prescribing penalties" must be drafted without ambiguity).

> ment challenge is foreclosed by *United States v. Harris*, 1954, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989. In view of the fact that this is not a criminal prosecution for wilful failure to report and that Appellees' conduct clearly was that of a persuader, their contention that the reporting provisions are void for vagueness is equally meritless.

Wirtz v. Fowler, 372 F.2d 315, 334-35 (5th Cir. 1966).

The consensus among courts today is that an ordinary civil statute is void for vagueness only where it exacts obedience to a rule that is "so vague and indefinite as really to be no rule or standard at all." *A. B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 239, 45 S.Ct. 295, 297, 69 L.Ed. 589 (1925). In *American Sugar Refining* the Court reaffirmed earlier decisions that a federal law proscribing "any unjust or unreasonable * * * charge in * * * dealing in or with any necessaries," was unconstitutionally vague. The standard, however, has rarely been applied. Courts have approved laws, for instance, that operate in narrow regulatory fields. *Brennan v. Occupational Safety and Health Review Commission*, 505 F.2d 869 (10th Cir. 1974), vindicated an O.S.H.A. regulation requiring that a person adequately trained in first aid be available at a workplace where there was no medical facility in "near proximity." 29 C.F.R. § 1910.151(b). The court, after distinguishing cases decided in the criminal or first amendment areas, wrote:

> We are considering a regulation promulgated pursuant to remedial civil legislation, *Ryder Truck Lines, Inc. v. Brennan*, 5 Cir., 497 F.2d 230, 233, and must do so "in the light of the conduct to which it is applied." *United States v. National Dairy Corp.*, 372 U.S. 29, 36, 83 S.Ct. 594, 600, 9 L.Ed.2d 561. The question is whether the regulation "delineates its reach in words of common understanding."

> *Cameron v. Johnson*, 390 U.S. 611, 616, 88 S.Ct. 1335, 1338, 20 L.Ed.2d 182. A permissible "leeway" is allowed in the field of regulatory statutes governing business activities in narrow categories. *Papachristou* [*v. City of Jacksonville*,] 405 U.S. [156,] at 162, 92 S.Ct. 839 [, 31 L.Ed.2d 110.]

505 F.2d at 872.

As the *Brennan* decision recognizes, absolute precision is often impossible in drafting workable laws. Where the draftsman is imprecise, his words may be given meaning by the context in which they apply. *Clark v. Weeks*, 414 F.Supp. 703, 707 n.3 (N.D.Ill. 1976). Statutes such as the Sherman Act have effected massive delegations of authority to the judiciary to narrow, define, and prescribe rules of conduct emanating from the most general sources. Judicial gloss will often cure vagueness problems, and the routine existence of differences in interpretation of a law does not void the law. *See United States v. Wise*, 550 F.2d 1180, 1187 (9th Cir. 1977); *Clark v. Weeks*, 414 F.Supp. at 707 & n.3; *Maley v. National Acceptance Co.*, 250 F.Supp. 841, 845 (N.D.Ga. 1965). *But see Horn v. Burns & Roe*, 536 F.2d 251, 254 n.7 (8th Cir. 1976) (federal courts may not provide limiting interpretation of state statutes).

The very business of courts is interpretation of statutes. Were the mere existence of uncertainty as to a law's construction or application to mean the law was fatally vague, there would be very few laws left on the books. Where an ordinary civil statute can reasonably be interpreted and limited by judicial construction, it will withstand a vagueness challenge.

With this standard in mind, we have little difficulty approving the admittedly imprecise language of the Georgia Act. A gasoline distributor is well apprised of the contours of the prohibited activity. Most of the

challenged words are employed in everyday commercial discourse and ambiguities may be readily resolved by the Georgia courts. The law is surely not a model of clarity, but it does better than to impose "no rule or standard at all." *American Sugar Refining*, 267 U.S. at 239, 45 S.Ct. at 297. Given the extreme tolerance with which the court must scrutinize the Act in a vagueness challenge, we are unable to sustain plaintiff's attack on the imprecision of the language employed.

Section 106-1104.1 presents an additional difficulty. In one extraordinarily lengthy sentence, the section states:

> It shall be an unlawful predatory and unfair business practice for an automotive gasoline distributor who controls a product supply, controls the price of that product and has the power to require the purchase of that product by another automotive gasoline distributor or an automotive gasoline dealer doing business in this State to sell said product at prevailing automotive gasoline distributor prices at any time to another automotive gasoline distributor for resale to automotive gasoline dealers with the purpose or intent that said product will be sold at retail by said automotive gasoline distributor and fails to offer its automotive gasoline dealers an opportunity to purchase an equal volume of product upon the same terms and conditions, excepting expenses for advertising, credit cards and other expenses relative to its automotive gasoline dealers, when said automotive gasoline distributor is selling said product at distress prices to other automotive gasoline dealers in the dealer's marketing area.

A casual reading of the section gives the impression that a clear meaning may be gleaned upon more careful examination. A careful reading, however, discloses that the section is grammatically deficient. Midway through the sentence, its author abandoned the infinitive form of

the verbs that describe proscribed activity and adopted the third person singular of the present tense: "and fails to offer its automotive gasoline dealers . . . ." As a consequence the reader has difficulty discerning whether the section proscribes two sets of activities, those before and those after the central conjunction "and," or whether the section imposes a single prohibition, conditioned by all of the given clauses.

The difficulty in understanding section 106-1104.1 is illustrated by the fact that the parties have assumed it to have entirely different meanings. Exxon writes:

> Section [106-1104.1] appears to require an automotive gasoline distributor such as Exxon, which sells gasoline both to other distributors (wholesalers) and to dealers (retailers), to sell gasoline to dealers at the same price offered to any distributor which sells to other dealers at "distress" prices within the same marketing area.

Exxon brief filed September 22, 1978, at 6. Amicus Gulf Oil Corporation writes:

> Section 1104.1 of the Act provides that when a supplier "controls product supply", "controls price", has "power to require purchase" and is selling product at "distress prices", it is an unlawful predatory and unfair business practice for such supplier to sell to a jobber for resale to dealers "with the purpose or intent that said product will be sold at retail by [the jobber]" unless the supplier offers its dealers ". . . an opportunity to purchase an equal volume of product upon the same terms and conditions."

Brief of Amicus Gulf Oil Corporation, filed November 22, 1978, at 3. Plaintiff GOA contends

> Section 1104.1 appears to provide that a distributor commits an unlawful business practice when he sells

> gasoline to a dealer at a distress price and fails to offer his automotive gasoline dealers an opportunity to purchase an equal volume of product upon the same terms and conditions, excepting expenses for advertising, credit cards and "other expenses relative to its automotive gasoline dealers."

Brief of plaintiff GOA in reply to defendant's motion for summary judgment, filed September 25, 1978, at 10.

By contrast, defendant GAPR considers that section 106-1104.1 contains two separate prohibitions. GAPR argues that the provision:

> (1) Prohibits distributors (oil company or local jobber) from selling gasoline to another distributor (oil company or local jobber) at wholesale prices with the purpose or intent that the gasoline will be sold at retail by that distributor in employee operated stations.
>
> (2) Prohibits automotive distributors (oil company or jobber) from selling gasoline at distress prices to non-captive buyers unless they grant its captive buyers the same opportunity to purchase that gasoline upon the same terms and conditions, excepting expenses for advertising credit cards and other expenses relative to its captive dealers.

Brief of defendant GAPR in support of its motion for summary judgment, filed November 1, 1978, at 6.

The court is not called upon to apply the statute here, only to determine its constitutionality. We have no need, and thus decline, to decide definitively which of the conflicting interpretations is correct. Nevertheless, the differing views as to its basic operation raise vagueness questions that must be resolved. Were the section so garbled that it was impossible to divine, in even the most general terms, which acts it sought to proscribe, then the court would be sorely tempted to hold it unconstitutionally

vague. GAPR has, however, made a persuasive showing that its reading of the section is correct. GAPR's interpretation not only seems more logical, but is supported by the Georgia Act's legislative history: in an earlier form of the bill, the two halves of section 106-1104.1 were divided into separate subsections.

We suggest this interpretation of section 106-1104.1 only to demonstrate that the provision is capable of comprehension. The plaintiffs are sufficiently apprised of proscribed conduct so as not to be deprived of due process of law by its application. We therefore reject this second side of plaintiffs' void for vagueness theory, and turn to the contention that various sections of the Georgia Act are preempted by the federal Petroleum Marketing Practices Act.

V. PREEMPTION BY THE PETROLEUM MARKETING PRACTICES ACT

Where Congress has legislated in an area properly delegated to it, the supremacy clause of article VI of the United States Constitution preempts conflicting state law. The preemption doctrine may apply: (1) where there is direct conflict between state and federal regulation; (2) where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941) (invalidating state alien regulation law); or (3) where Congress has "occupied the field" in a given area so as to oust all state regulation, whether friendly or hostile. *See, e.g., Campbell v. Hussey*, 368 U.S. 297, 82 S.Ct. 327, 7 L.Ed.2d 299 (1961) (preemption of tobacco pricing).

The plaintiffs raise the first two theories of preemption, asking that the court declare invalid:

> Section 1104(i), which condemns a provision in marketing agreements requiring certain hours of op-

> eration, notwithstanding a good faith determination that such provision is of material significance to the franchise relationship; Sections 1104(j) and 1104 (k), which proscribe grounds for termination and nonrenewal; Section 1107, which limits a gasoline distributor's defenses in an action brought under the Georgia Act; and Section 1104(h), which condemns any "term or condition" which is contained in any marketing agreement and which "directly or indirectly" violates the Georgia Act.

Exxon brief filed September 22, 1978, at 11. Plaintiffs allege that it is impossible for gasoline distributors to comply with both federal and state law, and that the Georgia Act prescribes different standards than the federal statute, creating a conflict in purpose and objectives.

Subchapter I of the PMPA, 26 U.S.C. §§ 2801-2806, sets forth comprehensive terms regulating the termination and non-renewal of franchise agreements. It is conceded to affect "marketing agreements" between automotive gasoline dealers and distributors, as covered by the Georgia Act. The relevant preemptive provision is found at 15 U.S.C. § 2806(a):

> To the extent that any provision of this subchapter applies to the termination (or the furnishing of notification with respect thereto) of any franchise, or to the nonrenewal (or the furnishing of notification with respect thereto) of any franchise relationship, no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation (including any remedy or penalty applicable to any violation thereof) with respect to termination (or the furnishing of notification with respect thereto) of any such franchise or to the nonrenewal (or the furnishing of notification with respect thereto) of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision of this subchapter.

Where preemption is deemed to occur by virtue of conflict with a federal statute, the extent of preemption is largely a question of statutory construction. *See* L. Tribe, *American Constitutional Law* 377 (1978). In determining the preemptive scope of the PMPA, our task is greatly simplified by the expression of legislative intent found in section 2806. By specifying with such precision when the states must stand aside in favor of federal regulation, Congress implicitly marked out the bounds of the power it intended to exercise. Beyond those limits, state regulation may claim full federal approbation.

Congress has determined that the realm of termination or non-renewal of franchises shall be ruled exclusively by the federal sovereign. The court's duty is to detect acts of state trespass. It is agreed that the Georgia Act's provisions are not "the same as" those of the PMPA. Where there is impermissible encroachment, the offending portions of the Georgia law must fall.

The defendants concede, and the court agrees, that Ga. Code §§ 106-1104(i) and 106-1104(k) violate federally preempted territory. With certain exceptions, each makes it a violation of Georgia law for a distributor "to refuse to continue to deal with an automotive gasoline dealer with whom it has had a marketing agreement for three years . . . ." These sections purport to regulate in precisely the domain carved out for federal exclusivity. We hold that they are preempted by the PMPA and must be declared invalid under the supremacy clause. It follows that section 106-1107, which prescribes defenses in a lawsuit charging unlawful termination of a franchise, is also invalid.

Ga. Code § 106-1104(i) forbids distributors from requiring a dealer to operate for more than six days per week or more than 12 hours per day. The plaintiffs contend that the section is inconsistent with the PMPA, because the federal act allows more flexibility to the dis-

tributor wishing to terminate a franchise. Plaintiffs apparently envision a suit by a dealer claiming his franchise was terminated because of his refusal to accede to the distributor's demand for a work week longer than authorized by section 106-1104(i).

We think plaintiffs overstate the probable application of the section. It deals with the substantive terms of an existing contract, apparently conferring a cause of action upon a dealer anytime a franchise agreement provides for conditions that violate its limitations. Its practical effect is to forbid enforcement of what are deemed oppressive terms of a franchise agreement and, with the aid of section 106-1105, perhaps to confer a cause of action upon a dealer who has suffered by complying with the offending terms. The import of the section extends far beyond the narrow hypothetical situation feared by the plaintiffs. While we agree that existence of the PMPA forbids a suit by a Georgia dealer claiming he was terminated because he refused to agree to terms forbidden by the Georgia Act, this slight, unlikely possibility does authorize us to strike down the law. Congress carefully tailored the preemptive effect of the PMPA, and we would betray its purpose by reaching unnecessarily to find conflict with state law.

Section 106-1104(h) withstands the plaintiffs' attack for similar reasons. That section renders it unlawful

> to provide any term or condition in any marketing agreement, or other agreement, ancillary or collateral thereto, which term or condition directly or indirectly violates this Chapter; . . . .

The provision aims directly at the terms of a franchise agreement, and could have at best some fortuitous and attenuated application to a lawsuit over termination or nonrenewal of a franchise relationship. Again, the court will not go to unnecessary and unprincipled lengths to find state-federal conflict.

VI. PREEMPTION BY THE SHERMAN ACT

The plaintiffs direct their Sherman Act challenge to Ga. Code § 106-1104.1. It will be recalled that section 106-1104.1 includes a proscription against a producer's selling gasoline to a wholesaler at the prices charged to wholesalers if the producer has the "purpose or intent" that the wholesaler will resell the gasoline at retail. The plaintiffs argue that the Georgia law requires producers and wholesalers to confer and agree upon the destination of gasoline before reaching a price or before the producer may agree to sell. They charge that such an arrangement constitutes a vertical customer restriction, imposed by the producer in violation of the Sherman and Clayton Acts. The Acts impose penalties of up to three years imprisonment and, for a corporation, up to one million dollars in fines upon the principals to any contract, combination, or conspiracy in restraint of trade, and subject violators to treble damages actions by private plaintiffs. *See* 15 U.S.C. §§ 1, 15.

The state-federal conflict proposed by the plaintiffs may take two forms. First, the Georgia legislature may have attempted to coerce behavior that violates the antitrust laws. If this is the case, the state law obviously may not stand. *McDermott v. Wisconsin*, 228 U.S. 115, 132, 33 S.Ct. 431, 435, 57 L.Ed. 754 (1913). *See Free v. Bland*, 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed.2d 180 (1962). Second, the Georgia Act may violate the federal policy favoring competition even though no person complying with it violates the antitrust laws. *See Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035 (1951). In either case, "federal preemption seems clear where the state, without supervising the private power it creates,[7] attempts to authorize private

[7] The record does not suggest, and defendants do not contend, that Georgia has erected a "cohesive regulatory program" that might immunize coerced anticompetitive conduct under the state

parties to escape the structures of the antitrust laws, to compel them to act in a manner forbidden by the antitrust laws, or to prevent them from competing in a manner clearly mandated by federal law." I. P. Areeda & D. Turner, *Antitrust Law* 64 (1978).

We turn to the conduct mandated by the Georgia Act to determine whether it does in fact violate either the letter or the spirit of the Sherman Act. The plaintiffs characterize it as a vertical customer restraint in which the gasoline supplier limits the class of persons to whom a jobber may resell to retailers. Since the Supreme Court decision in *Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977), nonprice vertical restraints have been judged under the "rule of reason" standard. "Under this rule, the fact-finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Id.*, 433 U.S. at 49, 97 S.Ct. at 2557. The *Sylvania* case involved location clauses in franchise agreements, a moderate form of territorial restriction. The decision, overruling *United States v. Arnold Schwinn & Co.*, 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967), expressed sympathy toward restraints that adversely affected only intra-brand competition. The court emphasized that certain vertical restrictions might have redeeming qualities, including the potential for producing significant business efficiencies. 97 S.Ct. at 2560-61.

The *Sylvania* case renders our course much less certain than it otherwise might have been. The conduct compelled by the Georgia Act is no longer *per se*, or irrebutably, illegal. It is merely theoretically illegal. The plaintiffs have not cited, and our research has not dis-

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action doctrine of *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 89 L.Ed. 315 (1942). *See* L. Sullivan, *Handbook of the Law of Antitrust* 735 (1977).

closed, a single case where a state law has been invalidated because it compels activity that might be federally proscribed upon application of rule of reason analysis. Indeed, our research fails to disclose any decision even contemplating the application of the preemption doctrine to a rule of reason practice.

We stated earlier that there are potentially two forms of the preemption doctrine at work. *Schwegmann* invalidates state law compelling anticompetitive conduct, regardless of whether the state law actually forces anyone to commit an antitrust violation. The most serious anticompetitive effect that might be produced by application of section 106-1104.1 is the elimination of jobbers as competitors in the retail market. In *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 98 S.Ct. 2207, 2217-18, 57 L.Ed.2d 91 (1978), the Court did not even blink at the likelihood that *Schwegmann* preemption under the Sherman Act might bar the state from forbidding all petroleum producers and refiners from operating retail outlets. Like Maryland's law, the Georgia Act does not so contravene the spirit or goals of the Sherman Act that it must fall under the Supremacy Clause.

As in *Exxon*, there is a second strain of possible preemption: the spectre of physically incompatible demands by state and federal law. The plaintiffs contend that section 106-1104.1 not merely contravenes the procompetitive spirit of the Sherman Act but will actually compel gasoline distributors to violate the Act. Where it may be physically impossible to meet the demands of both state and federal sovereigns, the importance of even a slight inconsistency in policy grows larger.

The court entertains serious doubts as to whether the practices that will be compelled by section 106-1104.1 are, after *Sylvania*, illegal. Despite the defendants' having filed a summary judgment motion, the plaintiffs have proffered very little evidence showing or even suggesting

an actual anticompetitive impact. The Georgia law will create no territorial monopolies and will, at most, eliminate only a small portion of the competitors in local retail markets.[8] The significance of price competition may be somewhat lessened by the existence of limited federal price controls. And unlike vertical price maintenance, the coerced practice has not been claimed to facilitate supplier cartels. *See* Pitofsky, *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 Col.L.Rev. 1, 15-16 (1978).

The court must conclude that the likelihood of head-on conflict between state and federal law remains far too hypothetical to justify judicial intervention. The cases counsel restraint in seeking out such conflict, even where the acts compelled by state law are claimed to constitute *per se* antitrust violations:

> Appellants' first argument is that compliance with the Maryland statute may cause them to violate the Robinson-Patman Act. They stress the possibility that the requirement that a price reduction be made on a statewide basis may result in discrimination between customers who would otherwise receive the same price and they describe various hypothetical situations to illustrate this point. But, "[i]n this as in other areas of coincident federal and state regulation, the 'teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists.' *Huron Cement Co. v. Detroit*, 362 U.S. 440, 446, 80 S.Ct. 813, 817, 4 L.Ed.2d 852." *Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 45, 86 S.Ct. 1254, 1261, 16 L.Ed.2d 336. See also *State of Wisconsin v.*

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[8] We recognize, however, that wholesalers who can obtain gasoline more cheaply than retailers may be particularly effective competitors in the retail market.

Texaco, Inc., 14 Wis.2d 625, 111 N.W.2d 918 (1961). The Court in *Seagram & Sons* went on to say that [a]lthough it is possible to envision circumstances under which price discriminations proscribed by the Robinson-Patnam Act might be compelled by [the state statute], the existence of such potential conflicts is entirely too speculative in the present posture of this case" to warrant pre-emption. 384 U.S. at 46, 86 S.Ct. at 1261.

Exxon, 98 S.Ct. at 2216 (footnote omitted). Plaintiffs must show a genuine anticompetitive effect, a genuine likelihood of antitrust liability, and a genuine need for invoking the Supremacy Clause. The entirely hypothetical applicability of *Sylvania* is insufficient grounds for striking down the state law We resist unnecessary and unjustified speculation, and hold that there presently exists no conflict with the Sherman Act sufficient to invalidate the Georgia statute.

VII. REMAINING CONTENTIONS

Plaintiffs also charge that the Georgia Act (1) conflicts with the Robinson-Patman Act; (2) purports to legislate in an interstate area reserved exclusively for Congress; and (3) conflicts with the Federal Energy Petroleum Allocation Act of 1975, 15 U.S.C. § 751 *et seq.* (FEPAA). These points are more readily answered; we find none convincing.

The first two arguments were raised, on similar facts, in the recent *Exxon* decision. Maryland, besides requiring distributors to divest themselves of retail outlets, mandated that "voluntary allowances" be extended uniformly to all retail service stations in the state. Exxon claimed that the requirement upset the delicate Robinson-Patman formulation of when price discrimination is permissible: it reasoned that the state law denied refiners

the benefit of the good-faith defense found in section 2(b).

> The proviso in § 2(b) of the Robinson-Patman Act is merely an exception to that statute's broad prohibition against discriminatory pricing. It created no new federal right; quite the contrary, it defined a specific, limited defense, and even narrowed the good-faith defense that had previously existed. To be sure, the defense is an important one, and the interpretation of its contours has been informed by the underlying national policy favoring competition which it reflects. But it is illogical to infer that by excluding certain competitive behavior from the general ban against discriminatory pricing, Congress intended to pre-empt the States' power to prohibit any conduct within that exclusion.

98 S.Ct. at 2217 (footnotes omitted).

Plaintiffs next argue that retail and wholesale marketing of automotive gasoline is so exclusively federal in nature or so dependent on national uniformity that any state regulation is pre-empted under the supremacy clause. This challenge, when made to the Maryland law, was quickly discounted by the Supreme Court. The Court's logic is equally applicable here:

> To be sure, "the Commerce Clause acts as a limitation upon state power even without congressional implementation." *Hunt v. Washington Apple Advertising, supra,* 432 U.S. [333,] at 350, 97 S.Ct. [2434,] at 2445 [, 53 L.Ed.2d 383] (citations omitted): But this Court has only rarely held that the Commerce Clause itself preempts an entire field from state regulation, and then only when a lack of national uniformity would impede the flow of interstate goods. See *Wabash, St. Louis & Pacific R. Co. v. Illinois,* 118 U.S. 557, 7 S.Ct. 4, 30 L.Ed. 244; see also *Cooley v. Board of Wardens,* 12 How.

> 299, 319, 13 L.Ed. 996. The evil that appellants perceive in this case is not that the several States will enact differing regulations, but rather that they will all conclude that divestiture provisions are warranted. The problem thus is not one of national uniformity. In the absence of a relevant congressional declaration of policy, or a showing of a specific discrimination against, or burdening of, interstate commerce, we cannot conclude that the States are without power to regulate in this area.

98 S.Ct. at 2215.

Finally, we reject plaintiffs' contention that section 106-1104.1 conflicts with the FEPAA by disrupting the assigned price or supply allocations between wholesalers and retailers. Our reading of the section discloses no effect on allocations at different levels. A supplier must offer all retailers an equal share of distress gasoline. A supplier is not, however, required to provide every retailer with wholesale gasoline whenever a wholesaler sells at retail. Plaintiffs' final challenge rests on the premise that section 106-1104.1 contains a single prohibition. Having distilled the section into two separate proscriptions, we reject this challenge.

VIII. CONCLUSION

The Georgia Act has withstood the majority of plaintiffs' challenges. We conclude and hereby declare that sections 106-1104(j), 106-1104(k), and 106-1107 are invalid as preempted by the federal Petroleum Marketing Practices Act. The remainder of the Georgia law stands intact.

Accordingly, the cross-motions of all parties for summary judgment are GRANTED IN PART and DENIED IN PART, as set forth in the terms of this order. The Clerk of the Court shall enter final judgment in this action.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 80-7153

D.C. Docket No. CA78-982-A & CA78-1077-A

EXXON CORPORATION,
Plaintiff-Appellant,

v.

GEORGE D. BUSBEE, ETC. *et al.*,
Defendants,

GEORGIA ASSOCIATION OF PETROLEUM RETAILERS,
Defendant-Appellee.

GEORGIA OILMEN'S ASSOCIATION, INC.,
Plaintiff-Appellant,

v.

GEORGE D. BUSBEE, ETC. *et al.*,
Defendants,

GEORGIA ASSOCIATION OF PETROLEUM RETAILERS,
Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Georgia

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[Filed Jun. 4, 1981]

Before: TJOFLAT, FRANK M. JOHNSON, JR., and SCOTT,* District Judge.

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* District Judge of the Middle District of Florida, sitting by designation.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed;

IT IS FURTHER ORDERED that the plaintiff-appellant pay to the defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

May 11, 1981

A True Copy
Attested: June 2, 1981
Clerk
U.S. Court of Appeals,
Fifth Circuit

By: /s/ Phyllis J. Keener
PHYLLIS J. KEENER
Deputy Clerk
Atlanta, Ga.

Issued As Mandate: Jun. 2, 1981

GASOLINE MARKETING PRACTICES ACT OF THE STATE OF GEORGIA

106-1101 Short title

This Chapter shall be known and may be cited as the "Gasoline Marketing Practices Act."

106-1102 Declaration of policy

The General Assembly finds and declares that the distribution and sales through marketing agreements of gasoline in the State of Georgia vitally affects the general economy of the State, the public interest and public welfare, and that it is necessary, therefore, in the public interest to define the relationships and responsibilities of the parties to such agreements.

106-1103 Definitions

As used in this Chapter:

(a) "automotive gasoline distributor" means any person, firm or corporation who is engaged in the sale, consignment or distribution of gasoline to automotive gasoline dealers pursuant to marketing agreements;

(b) "automotive gasoline dealers" means any person engaged primarily in the retail sale of automotive gasoline and related products and services under a marketing agreement entered into with an automotive gasoline distributor;

(c) "marketing agreement" or "agreement" means a written agreement, including a franchise, and all related written agreements, between an automotive gasoline distributor and an automotive gasoline dealer under which such dealer is supplied automotive gasoline for retail sale or an agreement between an automotive gasoline distributor and an automotive gasoline dealer under which the automotive gasoline dealer is granted the right to

occupy premises owned, leased or controlled by the automotive gasoline distributor, for the purpose of engaging in the retail sale of gasoline of the automotive gasoline distributor;

(d) "retail sale of automotive gasoline" means the sale thereof for consumption, and not for resale, at a retail outlet serving the motoring public;

(e) "automotive gasoline" or "gasoline," as used in this Chapter, means octane rated fuels made from petroleum products for use in the propulsion of motor vehicles.

Nothing in this Chapter shall be construed as to repeal in any way the definition of distributor and the definition of dealer contained in section 92-1402(J), (M).

106-1104 Acts of distributor in violation of Chapter

It shall be a violation of this Chapter for any gasoline distributor who has a marketing agreement with a gasoline dealer, directly or indirectly, through any officer, agent or employee, to commit any of the following acts:

(a) to terminate or cancel such marketing agreement without good cause prior to the expiration date;

(b) to terminate or cancel an existing marketing agreement prior to expiration date or to not enter subsequent agreements without having first given written notice setting forth all the reasons for such action to the gasoline dealer at least 60 days in advance of such termination, cancellation or expiration of the existing agreement; provided, however, that such notice shall not be required of a gasoline distributor acting with reasonable cause to believe said dealer is maliciously and willfully damaging the property rights of said gasoline distributor, who has voluntarily abandoned the marketing relationship, or who after five days notice has failed to pay his just debts when due to said distributor;

(c) by the use of coercion, intimidation or threats, to force or induce such gasoline dealer to deal exclusively in products manufactured, distributed or sponsored by such gasoline distributor or to participate in promotions. Hours of operation, which are set in any written agreement, in effect prior to July 1, 1978, can only be changed by mutual consent. It shall also be the duty of the distributor to advise the dealer in writing prior to execution of the agreement the projected potential gallonage and the dealer shall acknowledge same in writing prior to execution of the marketing agreement that he is willing to accept same;

(d) to engage in any acts which have the purpose, intent or effect of fixing or maintaining prices, or of forcing or inducing adherence to prices at which such gasoline distributor's products are to be resold by such gasoline dealers: Provided, that nothing herein shall be deemed to prohibit recommendation, suggestion, urging or discussion;

(e) to require a gasoline dealer, at the time of entering into a marketing agreement, to assent to a release, assignment, novation, waiver or estoppel which would relieve any person from liability imposed by this Chapter;

(f) to require or prohibit any change in management of any gasoline dealer unless such requirement or prohibition of change shall be for good cause, which cause shall be stated in writing by the gasoline distributor;

(g) to impose standards of performance upon the gasoline dealer other than those in the marketing agreement;

(h) to provide any term or condition in any marketing agreement, or other agreement, ancillary or collateral thereto, which term or condition directly or indirectly violates this Chapter;

(i) after July 1, 1978, to require operation in excess of a six-day week and/or in excess of a 12-hour day if the dealer can prove it results in substantially lessening the profits earned in his entire operation to the extent that it is not economically feasible to continue said operation: Provided, however, that the provisions of this subsection shall in no way impair the obligation of contracts made prior to July 1, 1978: and Provided further, that the provisions of this subsection shall not impair the writing of a contract for hours in excess of the hours expressed herein or to impair the right to enforce the hours contained in any contract until sufficient evidence is available to a dealer to exercise the rights hereinbefore provided: and Provided, further, that the provisions of this subsection shall not be applicable to dealers or distributors who operate a food or convenience store in conjunction with the retail sale of automotive gasoline and related products;

(j) after July 1, 1978, to refuse to continue to deal with an automotive gasoline dealer with whom it has had a marketing agreement for three years unless:

(1) the dealer fails to comply with conditions of such agreement or fails to act in good faith in carrying out the terms of such agreement, or

(2) such automotive gasoline distributor's principal stockholder or principal operator dies during the term of any marketing agreement, in which case such agreement may be refused renewal by the heirs giving notice as provided for in this Chapter, or

(3) the dealer has violated the laws of this State relative to the ownership or operation of retail businesses;

(k) after July 1, 1978, to refuse to continue to deal with an automotive gasoline dealer with whom it has had a marketing agreement for three years if such automotive gasoline dealer satisfies the court in an action brought

by the automotive gasoline dealer under this Section that such refusal to deal is not the product of the good faith business judgment of the automotive gasoline distributor.

106-1104.1 Certain sales by distributor in violation of Chapter

It shall be an unlawful predatory and unfair business practice for an automotive gasoline distributor who controls a product supply, controls the price of that product and has the power to require the purchase of that product by another automotive gasoline distributor or an automotive gasoline dealer doing business in this State to sell said product at prevailing automotive gasoline distributor prices at any time to another automotive gasoline distributor for resale to automotive gasoline dealers with the purpose or intent that said product will be sold at retail by said automotive gasoline distributor and fails to offer its automotive gasoline dealers an opportunity to purchase an equal volume of product upon the same terms and conditions, excepting expenses for advertising, credit cards and other expenses relative to its automotive gasoline dealers, when said automotive gasoline distributor is selling said product at distress prices to other automotive gasoline dealers in the dealer's marketing area.

106-1105 Actions by dealers against distributors

Any automotive gasoline dealer may bring an action against its automotive gasoline distributor for violation of this Chapter in the superior court of the county where such distributor resides or, if the distributor is a corporation, in accordance with the provisions of Code Title 22, the Georgia Corporation Code, as amended, to recover damages sustained by reason of any violation of this Chapter: Provided, that the dealer shall show as a prerequisite to recovery under this section that he has: (a) complied with the reasonable requirements of the marketing agreement; and (b) has acted in good faith

in carrying out the terms of the marketing agreement. The court may grant such equitable relief as is proper, including declaratory judgment and injunctive relief. Attorneys' fees shall be controlled by Code section 20-1404, as now or hereafter amended.

106-1106 Applicability of Chapter

This Chapter shall not apply to a marketing agreement granted prior to the effective date of this Chapter: Provided, however, that a renewal of a marketing agreement or an amendment extending the lease period shall not be excluded from the application of this Chapter.

106-1107 Defenses of gasoline distributor

(a) It shall be a defense to any action brought under section 106-1105 that the marketing agreement was terminated or cancelled because the distributor is not receiving rental in accordance with the terms of the agreement or other legitimate business reason: Provided, however, assumption by the distributor of the dealer's operation shall not be a legitimate business reason for cancellation.

(b) No gasoline distributor may raise the defense set forth in subsection (a) of this section to an action brought under section 106-1105 unless he shall have given to the gasoline dealer who brings such action the written notice required by section 106-1104(b).

(c) This defense is in addition to other defenses specified in this Chapter and defenses available under contract or provided by law.

106-1108 Vacation of premises on termination of lease agreement

Upon receipt of notice to cancel or terminate an existing lease prior to expiration date, it shall be the duty

of the dealer to notify the distributor within 30 days thereof of his intention to hold over and to set forth in writing to the distributor his reasons and justifications therefor and to thereafter within 10 days file his complaint or application for injunction in the court of proper jurisdiction, and the judge of said court shall within 15 days conduct a hearing in said matter and thereafter within five days hand down a ruling based upon evidence presented as to the granting of a temporary injunction and failing to grant said injunction the dealer shall vacate said premises all according to said lease agreement.

106-1109 Applicability of Chapter

This Chapter shall apply to all marketing agreements as defined in section 106-1103(c).

106-1110 Chapter not affect sale of real property

This Chapter is not intended to alter or change the present law or regulations pertaining to the sale or transfer of title to real property, and the owner may at any time enter into a contract for the bona fide sale of his property.

106-1111 Distributors' cause of action

Any gasoline distributor may bring action against the dealer for failing to fulfill the marketing agreement and said dealer shall be liable for rental return as outlined in section 106-1107(a). Attorneys' fees shall be controlled by Georgia Code section 20-1404, as now or hereafter amended.

106-1112 Limitations

No action shall be brought under section 106-1105 or section 106-1111 unless commenced within two years after the cause of action shall have accrued.

Opposition

Office - Supreme Court, U.S.
FILED
SEP 14 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81-260

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

EXXON CORPORATION,
PETITIONER,

v.

GEORGE BUSBEE, ARTHUR K. BOLTON AND
GEORGIA ASSOCATION OF PETROLEUM RETAILERS,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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September 10, 1981

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly held the statute constitutional where the statute "is amenable to some sensible construction," "does alert the parties to the character of the proscribed conduct" and "does amount to something more than 'no rule. . . at all.'"

2. Whether the standard established by this Court in A.B. Small Co. v. American Sugar Refining Co. for review of civil statutes challenged as unconstitutionally vague has been clarified with respect to commercial regulatory statutes consistent with this Court's policy to uphold state statutes which do not involve limitations on free expression.

3. Whether the circuits have consistently and correctly applied the standard established by this Court for the review of civil statutes challenged as unconstitutionally vague.

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NO. 81-260

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

EXXON CORPORATION,
Petitioner,
v.

GEORGE BUSBEE, ARTHUR K. BOLTON and GEORGIA ASSOCATION OF PETROLEUM RETAILERS,
Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Georgia Association of Petroleum Retailers, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Fifth Circuit's opinion in this case. That opinion is recorded at 644 F.2d 1030.

STATEMENT OF THE CASE

The Gasoline Marketing Practices Act of 1973, codified as Ga. Code Ann. §§106-1101, et. seq., was enacted for the purpose of regulating and defining the relationships and responsibilities of parties involved in the distribution and sale of gasoline through marketing agreements in the state of Georgia. (Appendix to Petition at 37a). Section 1104.1 of the Act, which was the subject of review by the Court of Appeals below, was added by amendment in 1978. This section expressly prohibits an automotive gasoline distributor from (1) selling at wholesale prices to another distributor for sale at retail and (2) selling at distress prices to other distributors without offering its own dealers an opportunity to purchase the product on the same terms and conditions. Section 1104.1 states

as follows:

> It shall be an unlawful predatory and unfair business practice for an automotive gasoline distributor who controls product supply, controls the price of the product and has the power to require the purchase of that product by another automotive gasoline distributor or an automotive gasoline dealer doing business in this State to sell said product at prevailing automotive gasoline distributor prices at any time to another automotive gasoline distributor for resale to automotive gasoline dealers with the purpose or intent that said product will be sold at retail by said automotive gasoline distributor and fails to offer its automotive gasoline dealers an opportunity to purchase an equal volume of product upon the same terms and conditions, excepting expenses for advertising, credit cards and other expenses relative to its automotive gasoline dealers, when said automotive gasoline distributor is selling said product at distress prices to other automotive gasoline dealers in the dealer's marketing area.

Petitioner's appeal to the Fifth Circuit was from that part of the District Court's Order upholding the constitutionality of Section 1104.1 which petitioner challenged as unconstitutionally vague.

The District Court found little difficulty in approving the language of section 1104.1 since a "gasoline distributor is well apprised of the contours of the prohibited activity." (Appendix at 20a). Recognizing that Section 1104.1 is a civil statute regulating commercial enterprise, the District Court correctly stated and applied the standard of review that "the mere existence of uncertainty as to a law's construction or application" is not sufficient to sustain a vagueness challenge "[w]here an ordinary civil statute can reasonably be interpretated and limited by judicial construction." (Appendix at 20a). In response to petitioner's contention that certain terms used in Section 1104.1 are not defined in the Act, the District Court found that "[m]ost of the challenged words are employed in everyday commercial discourse and ambiguities may be readily resolved by the

Georgia courts." (Appendix at 20a-21a).

Quoting at length from this Court's decision in A. B. Small Co. v. American Sugar Refining Co., 267 U.S. 233 (1924), the Court of Appeals correctly determined that the void-for-vagueness doctrine does apply to commercial regulatory statutes such as Section 1104.1. However, because neither first amendment rights nor criminal conduct were involved, the purpose of the doctrine required more than a finding of mere uncertainty but rather that the statute "must be substantially incomprehensible" to be a deprivation of due process. (Appendix at 8a). Applying this test to Section 1104.1, the Court of Appeals found that this section "does alert the parties to the character of the proscribed conduct, Ryder Truck Lines, 497 F.2d at 233, and does amount to something more than 'no rule . . . at

all.' A. B. Small Co., 267 U.S. at 239, 45 at S.Ct. 297." (Appendix at 8a). Thus, applying the standard of review enunciated by this Court for reviewing commercial legislation challenged as unconstitutionally vague, the Court of Appeals correctly affirmed the decision of the District Court upholding Section 1104.1.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE WRIT SHOULD BE DENIED BECAUSE THE COURT OF APPEALS CORRECTLY APPLIED THE STANDARD OF REVIEW APPLICABLE TO CIVIL STATUTES CHALLENGED AS UNCONSTITUTIONALLY VAGUE AS ENUNCIATED BY THIS COURT.

In applying the void for vagueness doctrine, the Court of Appeals did not simply apply a mechanical rule of construction but properly considered the theory behind the doctrine as enunciated by this court in A.B. Small Co. v. American Sugar Refining Co., 267 U.S. 233

(1925). Having fully considered the purpose of the doctrine and its application to Section 1104.1, the Court of Appeals correctly held that section 1104.1 is not unconstitutionally vague.

The petition attempts to create a conflict between the holding of the decision of the Court of Appeals and the holding of this Court in A.B. Small Co. by implying that the standard applied by the Court of Appeals was whether the statute "may be interpreted" and by the conclusory assertion that the decision below upholds a statute which does not afford proper notice of the proscribed conduct. (Petition at 8). This contention totally ignores the express findings of the Court of Appeals below that Section 1104.1 is "amenable to some sensible construction," that it "does alert the

parties to the character of the proscribed conduct," and that it "does amount to something more than 'no rule. . . at all.'" Based on these express findings, the application of the holding and rationale of A.B. Small Co. demands the holding of the Court of Appeals that Section 1104.1 is sufficiently definite to withstand a constitutional challenge.

Petitioner further challenges the validity of the standard set forth by this Court in A.B. Small Co. However, petitioner not only fails to articulate any reason for the need to review the A.B. Small Co. standard, other than the passage of time, but also overlooks subsequent decisions of this Court which have clarified and reaffirmed the application of the A.B. Small Co. standard to

civil legislation.1/

Since its decision in A.B. Small Co., this Court has repeatedly affirmed that the void for vagueness doctrine would be applied with leniency to statutes regulating commercial activity. In Winters v. New York, 333 U.S. 507 (1948), this Court stated:

> this Court goes far to uphold state statutes that deal with offenses, difficult to define, when they are not entwined with limitations on free expression.

333 U.S. at 517. In United States v. National Dairy Corp., 372 U.S. 29 (1963), this Court affirmed that where the statute being challenged "is directed only at conduct designed to destroy competition,

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1/ Petitioner's excessive discussion of the applicability of the vagueness doctrine to civil legislation is superfluous. Respondent does not contend that the doctrine is inapplicable to civil legislation, and the Court of Appeals expressly held that even commercial regulatory statutes were subject to review for vagueness.

activity which is neither constitutionally protected nor socially desirable," a different vagueness standard would be applied than in cases arising under the First Amendment, and the statute would not be considered merely "on its face" but also "in the light of the conduct to which it is applied." 372 U.S. at 36. In Papachristou v. The City of Jacksonville, 405 U.S. 156 (1972), the Court affirmed that "[i]n the field of regulatory statutes governing business activities, where the acts limited are in a narrow category, greater leeway is allowed." 405 U.S. at 162. In United States v. The Petrillo, 332 U.S. 1 (1947), the A.B. Small Co. standard was reaffirmed by the Court's statement that a statute is not unconstitutionally vague so long as it "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."

332 U.S. at 8.

Particularly in light of the cases cited immediately above, petitioner's citation of Giaccio v. Pennsylvania, 382 U.S. 399 (1966), is misleading. Giaccio involved a state statute prescribing a penalty to be collected by the state against a criminal defendant. It is apparent from the language of the decision that this Court considered the statute challenged in Giaccio to constitute a penal statute subjecting the appellant to a "sentence" to enforce payment of the penalty. 382 U.S. at 402. Giaccio merely stands for the principle that the stricter standard applicable to a criminal statute under a void for vagueness challenge will be applied to state statutes which are "penal" in effect despite the fact that the state may label the law as "civil." Thus, the decision in Giaccio is irrelevant to, and does not

constitute a departure from, the A.B. Small Co. standard as applied to statutes regulating business activity.

Because the standard of review applicable to commercial statutes has been clearly enunciated by this Court and was fully considered and properly applied by the Court of Appeals in the present case, the writ should be denied.

II. THE WRIT SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT AMONG THE CIRCUITS REGARDING THE STANDARD OF REVIEW APPLICABLE TO CIVIL STATUTES CHALLENGED AS UNCONSTITUTIONALLY VAGUE.

As is apparent from the cases cited in the petition, there is no conflict among the circuits with regard to the proper standard of review to be applied to civil legislation which is challenged as being unconstitutionally vague. The petition fails to explain how the language quoted from the various circuit opinions

is in conflict either among the circuits or with the opinions of this Court.

There is nothing in this Court's decision in A.B. Small Co. or subsequent decisions applying the vagueness doctrine which even imply that A. B. Small Co. is the "only formulation of the appropriate standard of review" as Petitioner assumes. (Petition at 9). While the language cited in the petition from the decisions of the Eighth and Tenth Circuits states the standard in different words than those used by this Court in its decision in A. B. Small, in each of these decisions the application of the standard was consistent with the theory as enunciated by this Court in A.B. Small. As stated by the Court in Connally v. General Construction Co., 269 U.S. 385 (1925), decided one year following the decision in A.B. Small Co., the decisions of the Court upholding statutes challenged as uncon-

stitutionally vague turned on the finding that the terms used in the statutes were "well enough known to enable those within their reach to correctly apply them." 269 U.S. at 391. Thus, the true standard, whatever language may be employed to express it, is, as stated by the Court of Appeals, whether the statute "does alert the parties to the character of the proscribed conduct." (Appendix at 8a). What the petition fails to recognize, although it is stated in the decisions cited in Part II of the petition,2/ is that the degree of certainty required of a civil

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2/ Footnote 5 at page 9 of the petition is puzzling since each of the decisions cited by Petitioner correctly states the standard of review enunciated by this Court and distinguishes the degree of scrutiny to be applied to civil statutes as opposed to criminal statutes or those involving First Amendment rights as mandated by decisions of this Court. Horn v. Burns & Roe, 536 F.2d 251, 254 (8th Cir. 1976); Jump v. Goldenhersh, 619 F.2d 11, 15 (8th Cir. 1980); Brennan v. Occupational Safety & Health Review Cmsn., 505 F.2d 869, 872 (10th Cir. 1974);

statute to meet the above standard is not as great as that required of statutes imposing criminal sanctions or affecting rights of free expression. United States v. National Dairy Corp., 372 U.S. 29 (1963).3/

Because this Court has clearly enunciated the standard of review for laws challenged as unconstitutionally vague and "its implication for different types of

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Exxon v. Georgia Assoc. of Petroleum Retailers, 644 F.2d 1030, 1033 (5th Cir. 1981). The Ninth Circuit case cited by Petitioner, PACCAR, Inc. v. National Highway Safety Administration, 573 F.2d 632 (9th Cir. 1978), involved a statute imposing penalties and, whether labeled civil or criminal, was penal in nature and, therefore, properly subjected to a stricter standard of certainty.

3/ Footnote 7 at page 11 of the petition is not relevant to the issues raised in the petition. Federal Election Commission v. Lance, 635 F.2d 1132 (5th Cir. 1981), involved the construction and application of a federal statute by the federal court unlike the present case which is a declaratory judgment action involving the limited question of the constitutionality of a state law.

of statutes" (Appendix at 6a-7a) and that standard has been consistently and correctly applied by the circuits, the writ should be denied.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 10, 1981

Amicus Brief

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No. 81-260

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

EXXON CORPORATION,

Petitioner,

v.

GEORGIA ASSOCIATION OF PETROLEUM RETAILERS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-260

EXXON CORPORATION,

Petitioner,

v.

GEORGIA ASSOCIATION OF PETROLEUM RETAILERS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR FILING BRIEF AMICUS CURIAE

Georgia Oilmen's Association ("GOA"), Plaintiff-Appellant before the Fifth Circuit in the above case, moves for leave to file its Brief Amicus Curiae, without consent, in support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit by Exxon Corporation, under Paragraph 3 of Rule 36.

GOA represents over three hundred small, independent gasoline distributors whose livelihood will depend upon the final adjudication of the Georgia statute under review. It is the purpose of GOA to be certain that the interests of the small, independent

gasoline distributors be recognized, as well as that of the major oil companies.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE AMICUS CURIAE

The Georgia Oilmen's Association ("GOA"), a plaintiff-appellant before the Fifth Circuit Court of Appeals, is a non-profit corporation whose active membership consists of approximately 300 gasoline jobbers, wholesalers and distributors which operate in the State of Georgia. The members of GOA are "automotive gasoline distributors" within the meaning of the Georgia Gasoline Marketing Practices Act. Ga. Code § 106-1103(a) ("Georgia Act"). As such, members of GOA are vitally affected by the decisions of the courts

below upholding the constitutionality of section 1104.1 of the Georgia Act.

REASONS FOR GRANTING THE WRIT

GOA submits that the reasons set forth in the petition are sufficient, in themselves, to justify granting the writ in this case. As fully discussed in the petition, the decision of the Court of Appeals below conflicts, first, with the holding and rationale of this Court's decision in *A. B. Small Co.* v. *American Sugar Refining Co.*, 267 U.S. 233 (1925), and, second, with holdings of at least three other circuits regarding the standard of review applicable to civil statutes challenged as unconstitutionally vague.

The detrimental effects of the decisions below, however, are felt with particular severity by the more than 300 members of GOA each of which is subject to the unintelligible pricing and distribution requirements of section 1104.1 of the Georgia Act. The pervasive vagueness and numerous ambiguities of section 1104.1 render it impossible for GOA members to conduct their business operations with even minimal confidence that their pricing and distribution practices comport with the requirements of section 1104.1.

Actions have now been instituted, and others threatened against GOA members seeking to enforce section 1104.1 and to recover damages alleged to result from the asserted violation. The jeopardy to which each GOA member is subject is the result not only of the decision of the Court of Appeals upholding the constitutionality of section 1104.1, but also of the express refusal of the courts below "to decide definitively which of the conflicting interpretations is correct."

(Appendix at 8a, 23a.) Unless reviewed by this Court, the decision of the Court of Appeals will subject members of GOA to statutory sanctions without being afforded constitutionally mandated notice of the conduct proscribed.

The right of GOA members and others similarly situated to conduct their business operations with knowledge of statutory proscriptions, and without threat of sanctions for non-compliance with an incomprehensible statute, provides an additional basis for granting the writ in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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